No. 80532-6

SUPREME COURT OF THE STATE OF WASHINGTON

RENTAL HOUSING ASSOCIATION OF PUGET SOUND,

Appellant,

v.

CITY OF DES MOINES,

Respondent.

AMICUS CURIAE BRIEF OF WASHINGTON COALITION FOR OPEN GOVERNMENT

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I. IDENTITY AND INTEREST OF AMICUS

A. THE WASHINGTON COALITION FOR OPEN GOVERNMENT

The Washington Coalition for Open Government ("WCOG") is a Washington nonprofit, nonpartisan organization that represents a cross-section of the Washington public, press and government and is dedicated to promoting the public's right to know in matters of public interest.

B. AMICUS' INTEREST IN THIS CASE

Amicus has a vested interest in the long-term viability of the Public Records Act to enable the people to evaluate the actions of the agencies and officials who serve them. In the present case, amicus is particularly concerned about ensuring proper construction and application of the statute of limitations provision found within the Public Records Act. The statute of limitations is correctly read only to cut off daily penalties that inure to agencies for failure to follow the Act's statutory mandates, but it cannot be read as a substantive determination of the merits of a request that would preclude a requestor from filing a new request for the same records.

Indeed, should an agency properly invoke a statute of limitations to avoid paying penalties on a requesting party's initial request, that same requestor must be allowed to file a second request for the same or similar

records without the statute of limitations adjudication impacting required disclosure of public records.

In the case at bar, the City's decision to "re-review" whether the records were, in fact, exempt from disclosure muddied the waters as to the running of the statute of limitations, since the "re-review", denying the initial request of the Rental Housing Authority ("RHA"), was not completed until January 26, 2006, a date within one year prior to commencement of the instant lawsuit. Moreover, there can be no question that the RHA's new public records request of January 25, 2006 triggered a new one-year statute of limitations, and the initiation of litigation on January 16, 2007 satisfied the one-year limitation requirement.

Amicus has an interest in each of these areas of statutory interpretation within the PRA because the results impact amicus' members and the public at large. These issues of statutory construction are issues of first impression in Washington and must be adjudicated correctly to ensure faithful adherence to the legislative history of the PRA.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the City of Des Moines' ("City's") wrongful denial of the RHA's request for access to, and public disclosure of, non-exempt public records by invoking a strained and overly-narrow

reading of Washington's Public Records Act ("PRA" or "the Act"), RCW 42.56, *et. seq.*

The King County Superior Court's decision jeopardizes the intended effect of including a statute of limitations within the PRA. Namely, the one-year statute of limitations is meant only as a cut-off date for the daily penalties prescribed by RCW 42.56.550(4) that an agency may face if it wrongfully denies a request for public records. However, the statute does not provide that it also functions as a collateral decision on the merits of an agency's claimed exemption. In order to reinforce that the statute of limitations does not terminate substantive rights concerning whether an exemption is applicable, this Court must reject any implication that the statute of limitations constitutes "finality" as to whether access should be granted to public records as opposed only to cutting off daily penalties as to a specific request.

Although this Court has not addressed this precise factual situation under the revised PRA, the Court had the opportunity to rule on a very similar issue in *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421 (2004), wherein the Court found that the statute of limitations is appropriately used as setting out the directive for the time period for imposing daily penalties. *Id.* at 437. Following this precedent and the clear language of the statute, this Court should reaffirm the PRA's statute of limitations role

as a penalty cut-off, not a substantive decision on the merits of a claimed exemption.

Closely related to the above construction, a requesting party must be allowed to re-file or clarify his or her request for public records without the responding agency being permitted to rely upon a prior statute of limitations dismissal as foreclosing access to the requested records. This right is protected by the presumption in favor of access expressed throughout the PRA and the common-sense application of the statute of limitations.

The trial court's decision must be overturned because it does not comport with the proper application of the PRA: 1) the statute of limitations must be properly construed as a bar only to daily penalties and not a substantive decision on the merits; and 2) a requesting party must have the assurance that it be able to file a renewed records request without an agency relying upon a previous statute of limitations judgment as an adjudication as to whether public records must be disclosed.

Amicus requests that this Court reverse the Superior Court decision and allow RHA's case to proceed on the merits.

III. ARGUMENT

A. THE PUBLIC RECORDS ACT MANIFESTS THE LEGISLATURE'S INTENT TO PROMOTE ACCESS AND OPEN GOVERNMENT.

The Court has repeatedly recognized the important government accountability function that the PRA serves. Among the Court's many decisions is *Progressive Animal Welfare Soc'y v. Univ. of Wash. (PAWS II)*, 125 Wn.2d 243 (1994), in which the Court said:

> The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests.

PAWS II, 125 Wn.2d at 251. Furthermore, the Court noted, "In the famous words of James Madison, 'A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both.'" *Id.*

It is from these open government and representative democracy principles that statutory interpretation of the PRA flows. *See Daines v. Spokane County*, 111 Wn. App. 342, 347 (2002) ("The purpose of the [PRA] is to keep public officials and accountable to the people.") The Act itself states three times that courts should interpret the PRA liberally to effectuate disclosure. *See King County v. Sheehan,* 114 Wn. App. 325,

338 (2002). The PRA presumes disclosure and withholding documents is the exception. *See Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 793 (1990). Accordingly, courts are required to construe the PRA's provisions liberally and to interpret the exemptions narrowly. RCW 42.56.030.

In short, the PRA is a clearly worded mandate for public access. At issue in this case is a requestor's fundamental right to access and the struggles against bureaucratic obstacles and ongoing agency refusal to properly comply with statutory requirements. Based upon the history of the statute and the unequivocal preferences for disclosure built into the Act's text, it is this Court's role to safeguard the legislative intent of the drafters and the clear will of the people.

B. THE PRA'S STATUTE OF LIMITATIONS MAY CUT OFF A RECORD REQUESTOR'S ABILITY TO COLLECT PENALTIES BUT DOES NOT CONSTITUTE A JUDGMENT ON THE MERITS OF AN AGENCY'S CLAIMED EXEMPTION.

The PRA's statute of limitations terminates an agency's liability for daily penalties after one year but does not foreclose access to the records requested. The PRA states that a claim for wrongful denial of a records request must be filed within one year of the agency's proper claim of exemption or its last production of a record on a partial or installment basis. RCW 42.56.550(6). An agency that has wrongfully denied or withheld records is liable for damages of between $5 and $100 for each

day the request was wrongfully delayed. RCW 42.56.550(4). The only limit to the time period for assessing the mandatory daily penalty is the statute of limitations. The one-year statutory period creates a finite period of time during which an agency is exposed to monetary liability for its wrongful actions. *Yousoufian*, 152 Wn.2d 421 (2004).

In *Yousoufian*, the requestor submitted a records request to King County asking for two distinct groups of records. *Id.* at 425. After multiple conversations, letters, denials and partial disclosures (similar to the City of Des Moines' tactics in the case at bar), the requestor filed suit in King County nearly three years after his initial request.[1] The trial court found the County liable for the wrongful withholding of records and proceeded to the damage calculation. *Id.* at 427. In calculating damages, the trial court arbitrarily determined that the statutory penalties would be limited to 120 days maximum, despite the fact that 647 days had elapsed between the time of the last correspondence and the date of the suit. *Id.* at 428. The Court of Appeals upheld the trial court's unilateral reduction of the penalty time period. *Yousoufian v. Office of King County Executive*, 114 Wash.App. 836, 851 (2003).

[1] Mr. Yousoufian filed his initial request on May 30, 1997. Following lengthy correspondence and partial disclosures from King County, Mr. Yousoufian filed suit against the County on March 30, 2000. At the time of suit, pursuant to RCW 42.17.410, the applicable statute of limitations was five years.

This Court reversed the lower courts, holding that the only limitation on the duration of per-day damages allowable to a successful requesting-party litigant is the statutory time period specified in the PRA:

> The PDA does not contain a provision granting the trial court discretion to reduce the penalty period if it finds the plaintiff could have achieved the disclosure of the records in a more timely fashion. While the trial court could utilize its discretion by decreasing the per day penalty during this period, **the only limitation on the number of days comprising the penalty period is the five-year statute of limitations**.

Yousoufian, 152 Wn.2d at 437 (emphasis added). As this Court made clear, other than the per-day limit on monetary penalties, the only other limitation on penalties an agency faces is the statute of limitations. The implication is that the intent of the statute is to bar recovery of damages as to a specific request beyond the specified one-year time frame. There is no indication the statute is meant to act as a substantive bar to future records requests. *Yousoufian* is an example of proper construction of the PRA's statute of limitations under the PRA.

That this is the proper construction is underscored by the fact that application of a statute of limitations in no manner addresses whether denial of access to a record is appropriate. In other words, application of

the one-year limitation for commencing a lawsuit is not a declaration that a record is not public and exempt from disclosure.

Certainly, it cannot be disputed that a requestor would not be barred access to specific records merely because another requestor had not commenced a lawsuit within time period of the statute of limitations. As a result, it makes no sense, from the perspective of meeting the statutory goal of providing full public access to records, to bar the initial requester from making a request for records that would be available to a second requestor, the only impact of the statute of limitations being a shorter time period for collecting daily penalties.

Proper statutory interpretation, however, protects both the agency and the requesting party. Agencies are protected from liability to requestors who sit on their rights for lengthy periods of time in an effort to drive penalties beyond the allowed one-year timeframe. Requestors are allowed the full balance of a year to file their complaints and may also commence a new, identical records request without fear that an agency's actions, which may have been dilatory or confusing as to on the initial request, will benefit the offending agency in cutting off substantive access to public records.

In the present case, "finality", as asserted by the City, cannot be interpreted as converting a trial court's procedural application of a time

limit into a substantive determination of the merits of access to public records. The statute of limitations is intended only to cut off daily penalties, not to foreclose access to public records; it is not a substantive determination of whether or not the exemption(s) relied upon by the City are applicable to the records withheld.

C. THE PRA'S STATUTE OF LIMITATIONS DOES NOT BAR A REQUESTOR FROM SUBMITTING A NEW PUBLIC RECORDS REQUEST.

A requestor must be allowed to file a new public records request more than one year after its initial request without an agency utilizing the statute of limitations as a bar to access. Both the plain text of the PRA, and the legislative intent behind the Act support the proposition that a requestor's opportunity to obtain records is not foreclosed simply based upon the timing of the second request.

Although facially elementary, the analysis is crucial. It is not difficult to imagine a scenario in which a requestor files an initial request, only to have an agency respond with vague denials and deficient citations to claimed exemptions. While corresponding with the agency, the requesting party finds itself more than one year removed from its initial request. Unaware of the statute of limitations (as many members of the public very well may be), the requestor files an action demanding the agency show cause why damages should not be assessed. The agency,

mindful of the one-year limitations period, moves to dismiss on statute of limitations grounds. The trial court agrees, dismissing the suit based upon its untimeliness.

Undaunted, the requestor files an identical public records request after the dismissal of his or her lawsuit. Now, at this precise juncture, an agency cannot be heard to claim that the requestor is precluded from obtaining the records based upon the statute of limitations where the merits of public access have not been reached. Although the lawsuit as to the initial request was barred as a matter of law, an agency should not be allowed to rely upon a procedural obstacle as to one request to bar submission of a new request. In fact, RCW 42.56.080 prevents an agency from responding to a request based on the identity of the requestor, and "identity" necessarily includes that a requestor had previously submitted an earlier identical request and had been barred by the statute of limitations from pursuing a lawsuit as to the past request.

Because the PRA's statute of limitations serves the narrow function of stopping the accrual of daily penalties as to an initial public records request, a requesting party must have the ability to renew its request without the cloud of a statute of limitations adjudication being used substantively against it on a subsequent request.

D. THE STATUTE OF LIMITATIONS HAD NOT EXPIRED WHEN THE INSTANT LAWSUIT WAS COMMENCED ON JANUARY 16, 2007.

Because of the inability of the City to provide a clear response as to the initial public records request submitted on July 20, 2005, the RHA on January 25, 2006 submitted a new request for the same records. The new request asked the City to produce the "long overdue records, along with documentation justifying the withholding of any records." CP 72. In addition, the January 25, 2006 RHA letter included a request for additional cost and revenue information generated after RHA made its original July 20, 2005 records request. CP 73-74.

The second request for basically the same records was, in fact, submitted one day prior to the date – January 26, 2006 – that the City Attorney finally completed its "re-review" of the original July 20, 2005 request. In response to inquiries from RHA, the City had, on October 12, 2005, through the City Attorney, stated that it would "re-review the applicable statutes and case law concerning these exemptions." CP 68. The re-review, completed on January 26, 2006, stated that the City believed it had "properly withheld exempt public records." CP 78. While this January 26, 2006 letter could certainly be construed by a member of the public as the City's final determination as to non-disclosure, thereby giving rise to the running of a one-year statute of limitations, RHA's letter

of January 25, 2006, asking for the records again, without question gave rise to a new one-year statute of limitations, particularly taken in context with the City's final denial of January 26, 2006. In any event, the statute of limitations as to the second request had not run when the RHA filed its lawsuit on January 16, 2006.

E. THE COURT'S DECISION SHOULD NOT BE READ AS ENCOURAGEMENT FOR INCOMPLETE RESPONSES BY AGENCIES.

A very real danger presented by the trial court's decision is its failure to address that the original response of the City on August 17, 2005 did not comply with the statutory requirements concerning an agency's response to a public records request. RCW 42.56.210(3) states that if an agency refuses inspection of a public record, the agency "shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." (Emphasis supplied.) Thus, what must be contained in an agency response is mandatory.

The response of the City to the initial request did not comply with the statutory requirements because the City's response did not identify specific records or explain how specific exemptions applied to the records withheld.

This Court has mandated that a proper claim of exemption must contain three parts: (1) identification, "with particularly," of each individual record withheld; (2) identification of the "specific exemption" upon which the agency relies in withholding each record; and (3) an "explanation of how the exemption applies to the specific record withheld." *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 251, 884 P.2d 592 (1995).

The trial court failed to adequately explain how a clearly deficient response could trigger applicability of the statute of limitations. Nevertheless, even if, assuming arguendo, this Court were to determine that the statute of limitations as to RHA's first request began to run as of the date of the City's response of August 17, 2005, any such determination must not be interpreted as the Court sanctioning agencies making incomplete responses, contrary to the requirement of RCW 42.56.210(3) and the decision in *Progressive Animal Welfare, supra.*

IV. CONCLUSION

Amicus requests that this Court determine that the statute of limitations had not run when the instant lawsuit was filed on January 16, 2007 because the initial request of July 20, 2005 was renewed in a second request dated January 25, 2006, and the second request was within one-year prior to initiation of the lawsuit on January 16, 2007. Moreover, the

"finality" of the trial court's dismissal based on the statute of limitations must be limited to finality only as to the duration of when the per-day penalties under RCW 42.56.550(4) began to run. The statute of limitations under RCW 42.56.550(6) acts only as a limitation on the number of days a requestor can seek daily penalties and does not act as a substantive determination on the merits of whether records are actually exempt from disclosure. Finally, this Court should not sanction or suggest that an agency's response to a public records request that does not identify with particularity each record withheld, that does not identify the specific exemption upon which an agency relies in withholding a record, and that does not explain how exemptions apply to specific records withheld in any fashion complies with the requirements of RCW 42.56.210(3) and previous decisions of this Court.

RESPECTFULLY SUBMITTED this 2nd day of April, 2008.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 3rd day of April, 2008, I caused a true and correct copy of the foregoing document titled Amicus Curiae Brief of Washington Coalition for Open Government to be delivered by U.S. Mail to the following counsel of record:

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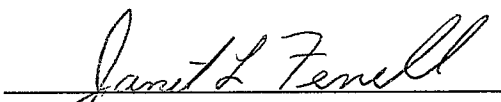

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